FOR ARGUMENT

No. 90-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KEITH JACOBSON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR THE PETITIONER

GEORGE H. MOYER, JR.
MOYER, MOYER, EGLEY,
FULLNER & WARNEMUNDE
114 West Third Street
P.O. Box C
Madison, NE 68748
(402) 454-3321
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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STATEMENT OF THE CASE

In footnote 11 at page 13 of the Respondent's brief, the Solicitor asserts that the Petitioner was offered only two opportunities to buy child pornography and he availed himself of both of them.

The Solicitor is mistaken. Judge Fagg wrote that:

> . . . the postal inspectors only provided Jacobson with opportunities to purchase child pornography and renewed their efforts from time to time as petitioner responded to their solicitations. 916 F.2d 470.

The Solicitor claims the quoted passage may be misleading because it suggests that the agents offered Petitioner opportunities to buy child pornography throughout the twenty eight month period that they were in communication with him.

Judge Fagg is not misleading. He understood quite correctly that Jacobson had been solicited quarterly to

purchase child pornography from February 1985 through at least March of 1987.

Postal inspector Stuart O. Patten sent Jacobson a questionnaire and membership application entitled *The American Hedonist Society* in late January of 1985 (TR166:3; 167:22). This "Society" was a function of the Postal Inspection Service in Madison, Wisconsin (TR166:8). It was a sting operation to try to get people to join it and trade through it (TR166:15). The materials which it offered were child pornograph (TR166:19). Jacobson returned his completed questionnaire to Patten on February 27, 1985 (TR165:15). Patten then enrolled Jacobson in the Society (TR169:24). Enrollment was a matter of preparing adhesive mailing labels with Petitioner's name and address on them and sending them to a postal inspector in Chicago who would mail Jacobson the "Society's" newsletter quarterly (TR170:21). Petitioner's membership was free (TR170:22). Jacobson received the newsletter for as long as the postal inspectors wanted to send them (TR171:21). The purpose of the sting was to identify people that were interested in child pornography (TR326:22), get them to trade through it and apprehend them (TR326:25). This sting was still going on at the time of Jacobson's trial (TR315:3).

The name of the newsletter was "Its a Small World." (Respondent's brief, p.4). The American Hedonist Society was a regional operation (TR326:9). There were a number of such operations around the country which all worked pretty much the same no matter what they were called. *United States v. Musslyn*, 865 F.2d 945 (C.A. 8, 1989) involved "Crusaders for Sexual Freedom" as well as "The American Hedonist Society." *United States v. Chin*, 934 F.2d 393 (C.A. 2, 1991) describes "Candy Love Club" (newsletter with advertisements for a variety of sexually oriented materials). *United States v. Mitchell*, 915 F.2d 521 (C.A. 9, 1990) and *United States v. Esch*, 832 F.2d 531 (C.A. 10, 1987) mention "Love Land," based in Loveland, Colorado (newsletter with classifieds

placed by postal inspectors or members offering child pornography). *United States v. Thoma*, 726 F.2d 1191 (C.A. 7, 1984), was another "Crusader's for Sexual Freedom" case (newsletter "C.S.F. Friends" containing ninety advertisements for a wide variety of sexual tastes). In *United States v. Nelson*, 847 F.2d 285 (C.A. 6, 1988), the sting was called "Ohio Valley Action League" (newsletter with ads for child pornography).

In *United States v. Mitchell*, *supra*, the Ninth Circuit quoted "Love Land's" membership application-questionnaire as follows:

> a society for those who adhere to the doctrine that pleasure and happiness is the sole god in life. We believe that we have the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without the restrictions placed on us by our outdated puritan morality.

This is word for word the "American Hedonist Society" membership application-questionnaire.

An article in Cardozo Arts and the Entertainment Law Journal, "*The Child Porn Myth*," Volume 7, No. 2, page 295, 324 (1989) by Lawrence A. Stanley, catalogs each of these regional stings including "Its a Small World: The Newsletter of the American Hedonist Society" which the author says is operated by Inspector Calvin Comfort. The author adds to the stings already mentioned: "Computer Link Coop," "New Age: The Truth Through Education," "Ponce De Leon, S.A. Fountain of Youth Inner Circle Club," "The Little Light" and the "American Sensuality Society." The author states:

> Government newsletters also encourage suspects to place advertisements soliciting or offering to sell or buy child pornography. All advertisements other than the targeted suspect's are placed by police officers so any attempt by the suspect to exchange, sell or buy pornography results in arrest.

Judge Heaney's dissent states at 916 F.2d at 475:

> The Postal Service then "enrolled" Jacobson in the American Hedonist Society and began sending him the

> Society's newsletters, which advertised sexually explicit materials for sale. Jacobson never ordered any of the advertised materials.

Judge Heaney also says that, "the government, in the guise of five separate fictitious enterprises and one fictitious individual, contacted Jacobson through the mail eleven more times (the first of the twelve being the "American Hedonist Society's" membership application-questionnaire) before he finally ordered *Boys Who Love Boys*. 916 F.2d 472.

Judge Lay says:

> Over a period of two and one half years, the government, using as a subterfuge various fictitutious organizations, repeatedly solicited Jacobson through the mail to purchase illegal pornography. 916 F.2d 471.

How did Judge Fagg, Judge Heaney and Judge Lay all overlook the fact which the Solicitor now claims he has discovered, that the Government only offered Jacobson child pornography twice? The answer is that the judges are right and the Solicitor has erred.

Judge Heaney mentions "eleven more" contacts. The contacts include the "Hedonist Society" newsletters.[1] The six stings Judge Heaney counts are "American Hedonist Society," "Heartland Institute for a New Tomorrow," "Midlands Data Research," the "Carl Long" correspondence, "Operation Borderline," and "Project Looking Glass."

Calvin Comfort knew that the "American Hedonist Society" newsletter contained advertisements for child pornography, and that Jacobson had never responded to a solicitation in the newsletter when Comfort sent his

[1] Jacobson received at least eight newsletters before March 1987. Since no newsletters were found when Jacobson's home was searched, defendant has been unable to make an exact count, but if the newsletters started coming in the second quarter of 1985, Jacobson received three in 1985, four in 1986 and at least one in 1987 prior to the Operation Borderline contact. The three Carl Long letters make eleven.

name to the Operation Borderline and Project Looking Glass.

Furthermore, Comfort knew that Jacobson had stated in the American Hedonist Society questionnaire that he was *opposed to* pedophilia (TR479:2). Comfort testified that the purpose of the "Carl Long" correspondence was to ascertain if Jacobson was involved in child pornography, see if he was inclined to send it through the mail, and invite him to send it in the mail (TR343:13). Comfort knew that Jacobson had responded to the "Heartland Institute" questionnaire that:[2]

> Not only sexual expression but freedom of press is under attack. We must be ever vigilant to counter attack wing fundamentals who are determined to curtail our freedoms (TR479:25).

The Solicitor's brief minimizes the purpose of the "Carl Long" correspondence. These letters were intended to persuade Jacobson to send Comfort child pornography and the tactic works beautifully if the subject is predisposed, as in *United States v. Fletcher*, 672 F. Supp. 1145 (N.D., Ia. 1987), *United States v. Zangger*, 848 F.2d 923 (1988). Both in his letter dated September 19, 1986 (E13, T375, 376) and his letter dated October 14, 1986 (E15, T375, 376) "Long" asks Jacobson to "send me your fantasy."

In his first letter to Comfort as "Long" on September 18, 1986 (E12, 375, 376) Jacobson said, "I think I should be able to read or view what I want in the privacy of my

[2] The Solicitor makes much of the Petitioner's letter to Heartland stating that Heartland had not sent him a questionnaire. The letter was correct, however, because "Midlands Data Research" sent it (TR338:9). The Solicitor argues that Jacobson didn't get a questionnaire from Midlands. However, he had a blank questionnaire, E103 (TR339:1). Comfort testified that Jacobson got two questionnaires at different times (TR340:1); that one of the two times the questionnaire was sent, Jacobson did not complete it (TR340:4); and that would have been the first time (TR340:7). The Solicitor quotes extensively from Exhibit 102 (E102, 368, 369) but Jacobson never sent this letter to Comfort (TR368:3) which tends to show that Jacobson changed his mind about receiving other surveys.

own home." Comfort as "Long" responded on September 19, 1986 (E13, 375, 376), "I agree with you about privacy. I am real discrete but still our conservative society wants to pry into private lives." The postal inspector's emphasis on discretion recurs in Jacobson's note to "Far Eastern Trading Co." (E3, 214, 214), "I want to be discrete to protect you and me."

On September 29, 1986 Jacobson also wrote "Long" that, "I like good looking young guys in their late teens and early twenties doing their thing together." (E14, 375, 376).

Therefore, Comfort had explored Jacobson's interest in "teenage sexuality" expressed to "Midlands Data Research" (E8, 356:356) May 31, 1986 and Comfort knew through the "Carl Long" correspondence that Jacobson was not involved in child pornography and was not inclined to use the mails to either send or receive it.

Nevertheless, Comfort sent Jacobson's name to "Operation Borderline" and "Project Glass" even though two years of testing and soliciting had failed to disclose that Jacobson had any desire to receive sexually explicit pictures of children through the mails. The undisputed evidence in the possession of postal authorities at the moment that Jacobson was included in "Borderline" and "Looking Glass" was that he was not trafficking in child pornography and that his sexual preference was homosexual but not pedophilic. This evidence had been obtained *after* postal authorities first contacted Jacobson.

The Government's brief also asserts that Judge Strom received the *Bare Boys* magazines in evidence as soon as he saw them. The judge did say, ". . . I, of course have not seen the magazines" (TR236:14). This remark is a little odd because the court had certainly seen the magazines by that time.

At TR4:7, the record shows that the judge asked the Assistant District Attorney if he intended "to get into the 404 materials this afternoon" (TR4:7). Upon being

assured that the Government would, the court asked to see "all of that so that I will be better prepared to consider any objections . . ." (TR4:9). He scheduled a meeting in chambers with counsel to review it (TR4:16).

When Judge Strom says at TR236:5 that he was bothered "the other day" because those magazines (*Bare Boys*) do not suggest illicit sexual activity, he is referring by "the other day" to the conference in his chambers.

ARGUMENT

The amicus briefs and the Solicitor's brief argue at length that the problem of child pornography is so serious and its consumers so secretive and circumspect that the tactics used against petitioner are justified.

This is just arguing that the ends justify the means. In fact, it is arguing that the ends are so important that the government may exploit children by purveying child pornography to prevent the exploitation of children.

Many of the cases cited by amicus and the Solicitor prove that real criminals can be apprehended, prosecuted and convicted without creating "naive first offenders" who are subjected to ignominy, disgrace and ruin by overzealous pursuit of a desirable objective.[3]

I. PROOF OF PREDISPOSITION MAY BE MADE BY EVIDENCE OF DEFENDANT'S PAST OFFENSES, PLANNING AND PREPARATION, EVEN READY COMPLAISANCE, BUT MERE READINESS ALONE IS NOT ENOUGH.

Both the Solicitor and Amicus Bliley argue that Jacobson's "ready complaisance" proves predisposition. The "ready complaisance" phrase appears in *United States*

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[3] "Project Looking Glass" produced four suicides including one in Nebraska. Stanley, *The Child Porn Myth*, 7 Cardozo Arts and Entertainment Journal 2 (1989) p. 325 and note 149.

v. Sherman, 200 F.2d 880 (C.A.2, 1952) in which Judge Learned Hand's opinion reversed Sherman's first conviction for the same offense which this Court later found he was entrapped to commit as a matter of law. The entire quotation is:

> The proof of this (predisposition) may be by evidence of his past offenses, of his preparation even of his 'ready complaisance.' 200 F.2d 882, 240 F.2d 951.

The words "ready complaisance" were adopted by Judge Hand from a prior opinion he had written in *United States v. Becker*, 62 F.2d 1007, 1008 (C.A. 1933) where he said:

> The only excuses (for inducement) that courts have suggested so far as we can find are these: an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes, his willingness to do so as evidenced by his ready complaisance. . . . We do not wish to commit ourselves to the doctrine that mere readiness is enough. . . . The whole (entrapment) doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent though ductile persons into lapses which they might resist. Such emotion is out of place if they are already embarked in conduct morally indistinguishable, and of the same kind.

The Government points to its Far Eastern Trading Co. contact letter and claims that its language shows that petitioner could not reasonably believe that it was not against the law to receive *Boys Who Love Boys*. At least one circuit court has viewed this same contact letter as offering "a safe and legal way to receive child pornography in the mail." *United States v. Chin*, supra.

The Solicitor ignores the overall impact of repeated solicitations upon a defendant battling with his desires. *The Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III-R), American Psychiatric Association, Washington, D.C., 1987 states at page

285 that in certain males, latent pedophilic sexual desires may be aroused in middle age. The postal service is aware of this phenomenon. In *United States v. Goodwin*, 854 F.2d 33, 35 (C.A. 4 1988), the Court notes that postal inspector's test correspondence with the defendant disclosed "that Goodwin was a beginner whose latent desires were just emerging."

Judge Clary observed the danger of over persistent solicitation in *United States v. Kros*, 296 F.Supp. 972 (E.D. Penn., 1969):

> By permitting such publications as "Swingers Life" to be sent through the mails, the Government, in a sense, lends an aura of legitimacy to all of the bizarre sexual activities which are explicitly suggested by each of the hundreds of personal ads which make up the magazine. Although this is not in itself enough to sustain the defense of entrapment, particularly where, as contended by the Government here, its tolerance of the magazine is constitutionally required, when the Government, itself goes further and runs an ad which is calculated to stimulate the prurient interest of persons such as defendant, it cannot, with good grace complain of the natural and probable consequences of its own act.

Of course, "It's A Small World" and "Far Eastern Trading Company" were publications which the Government was not constitutionally required to tolerate. These were vehicles created by the Government itself to sell child pornography.

What the postal inspectors had after two and a half years of quarterly newsletters, annual sexual surveys and solicitation by various "front" organizations here was not "ready complaisance." It was a naive first offender logically concluding that receiving *Boys Who Love Boys* could not be against the law or else the opportunities to do so would not be so frequently and persistently available.

II. PREDISPOSITION FOCUSES ON THE INTENT AND DISPOSITION OF THE DEFENDANT TO COMMIT THE CRIME CHARGED BEFORE HE IS CONTACTED BY GOVERNMENT AGENTS.

The Solicitor advances the notion that buying something which evokes a sexual response evidences a predisposition to commit the crime of receiving illegal material through the mail.[4] Next he argues that the lawful receipt of *Bare Boys I and II* proves that Jacobson was disposed to commit the crime of receiving child pornography through the mail relying on *United States v. Gantzer*, 810 F.2d 349 (C.A.2, 1982); *Osborn v. United States*, 385 U.S. 323, 17 L.Ed.2d 394, 87 S.Ct. 429 (1966), n.11; *United States v. Andrews*, 765 F.2d 1491 (C.A. 11, 1985); *United States v. Johnson*, 855 F.2d 299 (C.A. 6, 1988).

It is very important to note that the advertisement from which Jacobson purchased *Bare Boys* was not offered into evidence by the Government and that Jacobson testified he did not know he would receive magazines depicting such young subjects (TR449:13, 14). Surely, the subjects in *Bare Boys* are naked, but depictions of nudity, without more, constitute protected expression. *Osborne v. Ohio*, 495 U.S. ——, 109 L.Ed.2d 98, 111, 110 S.Ct. 1691 (1990).

The uncontradicted evidence in this case is that Jacobson was not seeking child pornography before he was

[4] The Solicitor concludes that *Bare Boys I and II* are lascivious because they contain a graphic focus on genitals coupled with the production of a sexual response in some persons. The evidence is that the magazines are not lascivious because they were not specifically designed to be erotic (TR397:13). The Government tried to overcome this testimony by inferring in the cross examination of Dr. Dienspier that the magazines may have provoked a sexual response in Jacobson (TR402:4, 7). Down this road lies the conclusion that nudity becomes pornography when it "turns someone on." Thus, a picture of a naked sixteen year old male in the hands of a normal male heterosexual, is not child pornography, but it is child pornography in the hands of Keith Jacobson. If the naked figure is a sixteen year old girl, the reverse must be true.

first contacted by postal inspectors. The Carl Long correspondence confirms that Jacobson's taste was for "guys in their late teens and early twenties doing their thing together." (E13).

Congress passed P.L.98-292, May 21, 1984, making it a crime to receive a visual depiction involving the use of a minor engaging in sexually explicit conduct in the mail. As amicus note, the purpose of the statute was to target "the child pornography underground" (Brief of National Center for Missing and Exploited Children, et al., p. 4). It was to provide postal inspectors with a tool to prosecute and convict the consumer of child pornography.

The sheer volume of cases cited by the Solicitor conclusively demonstrates the direction taken by the postal inspectors. The Government has become the number one commercial purveyor of child pornography in the United States.[5]

With that approach, however, has come the danger that overzealous officers will tempt those who are not members of the "child pornography underground." Naivete, loneliness and plain stupidity make individuals vulnerable to the commission of a crime which, when this case began with a raid on Electric Moon in 1984, and yet to be created.

In the cases relied upon by the Government, the intent to commit the crime charged was proved by some evidence predating contact by Government agents with the defendant. Petitioner insisted that the jury be instructed that a violation of 18 U.S.C. 2252(2) required a specific intent to violate the law and that entrapment required proof of willingness to commit a crime.[6] The Petitioner never persuaded the trial court to give these instructions so the question of Petitioner's intent to commit the crime

[5] Government created publications are the only publications in the United States today which advertise, sell, offer to purchase or exchange child pornograph. Stanley, *The Child Porn Myth*, 7 Cardozo Arts and Entertainment Law Journal 2, 1989 p. 324.

[6] Appellant's brief before the Eighth Circuit, page 25.

charged is unresolved. The Solicitor strains mightily to establish by argument and innuendo that Jacobson could not have been acting innocently, but he lacks the force of a jury verdict to sustain him.

The absence of such a finding troubled Chief Judge Lay who said in his dissent:

> Based on Jacobson's prior history, it is not clear that he would knowingly and voluntarily violate the law by purchasing obscene materials. The evidence fails to show Jacobson was predisposed to commit the crime of which he was ultimately convicted. (916 F.2d 471).

The Solicitor advances the proposition that predisposition can be proved by evidence of conduct which is not criminal. Petitioner concedes that evidence such as planning and preparation is probative. *United States v. Becker, supra.*

The cases cited by the Solicitor, however, do not appear to extend beyond this class of evidence. In *United States v. Gantzer, supra,* the predisposition evidence consisted of letters from Gantzer requesting catalogs advertising pornographic materials, letters to Gantzer discussing the availability of pornography and a catalog advertising pornographic films all predating his contact with postal inspectors. The Second Circuit held the evidence properly admitted because it permitted the inference that:

> far from being seduced by the Government, Gantzer's general purpose of obtaining and exchanging pornography, particularly child pornography was formed prior to Inspector Smith's invitation.

No such evidence exists in this case.

Johnson is not even remotely in point. He possessed a collection of child pornography consisting of one hundred magazines, fifty eight books and booklets, thirteen reels of film and numerous drawings all in the original postmarked envelopes disclosing that they had been received

from California, Denmark, Sweden and the Netherlands. He answered an ad placed by postal inspectors in a national magazine. The ad did not expressly say the inspectors were selling child pornography. Johnson asked for it. Johnson argued that the Government had failed to prove predisposition. The Sixth Circuit made short work of his contention.

Footnote eleven cited by the Solicitor in *Osborn v. United States, supra,* just says that when the defense of entrapment is raised, a searching inquiry into defendant's own conduct is appropriate, citing *Sorrells v. United States,* 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249 (1932). Mr. Justice Roberts, concurring in *Sorrells* said:

> It has been generally held, where the defendant has proved an entrapment, it is permissible to show in rebuttal that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense. This procedure is approved by the (majority) opinion of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted. 77 L.E.426.

But, as *Sherman v. United States,* 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958) plainly holds, not even convictions prevent a finding of entrapment as a matter of law, let alone the lawful receipt of two magazines which only innuendo can now elevate to the status of "lascivious."

In *United States v. Andrews, supra,* the defendant proposed to buy contraband food stamps from an undercover policeman. The undercover officer did not broach the subject, Andrews did.

None of the cases advanced by Respondent are like Jacobson.

III. THE FACTS OF THE ENTRAPMENT CASES CITED BY THE GOVERNMENT ARE NOT COMPARABLE TO THE FACTS SHOWN BY THE RECORD IN THIS CASE. THE DEFENDANTS WERE ALL PROVEN TO BE SEEKING CHILD PORNOGRAPHY BEFORE THEY WERE CONTACTED BY POSTAL INSPECTORS.

The Solicitor fortifies his argument with a footnote containing fourteen circuit court cases which the Solicitor asserts are "like this one." Of the fourteen defendants, eight did not raise the entrapment defense in the circuit court: *United States v. Chin, supra*; *United States v. Mitchell, supra*; *United States v. Dawson*, 869 F.2d 271 (C.A.7, 1990); *United States v. Musslyn, supra*; *United States v. Goodwin, supra*; *United States v. Donnhoffer*, 859 F.2d 1195 (C.A. 4, 1988); *United States v. Driscoll*, 852 F.2d 84 (C.A.3, 1988); *United States v. Esch, supra.*

As for the rest, with one exception, none comes near making even a close case of entrapment.

In *United States v. Moore*, 916 F.2d 1131 (C.A.6, 1990) defendant admitted he knew it was against the law to receive sexually explicit photographs depicting minors through the mail but he did it anyway. In *United States v. Johnson, supra, Johnson* was "clearly predisposed."

In *United States v. Nelson, supra*, defendant wrote a letter to a convicted child pornographer seeking photos of a "mature bi-lady and a young one, especially if its her daughter." The Government found the letter and enrolled Nelson in the "Ohio Valley Action League." The postal inspectors offered him a free ad in the Leagues "newsletter." When neither of these ploys succeeded, postal authorities mailed Nelson the trusty contact letter "from a fictitious Virgin Islands corporation." Nelson asked for a tape of "very young people" and a catalog. When he received the catalog, he ordered a video tape of minor females engaged in sexual acts. The Third Circuit noted that entrapment as a matter of law was a difficult question but resolved it in favor of the conviction because "at

the very outset, Nelson's letter seized in the December 1984 search evidences a predisposition to violate section (18 U.S.C.) 2252."

Such a letter is not in this record.

The Solicitor also cites *United States v. Rubio*, 834 F.2d 442 (C.A. 5, 1987). Customs agents had intercepted three magazines depicting sexually explicit behavior by minors addressed to Rubio before postal inspectors began their temptation of him and while they were still trying to provoke Rubio into buying sexually explicit photos of minors from them, another order by Rubio of foreign child pornography was intercepted by Customs. The Fifth Circuit called the government's conduct unquestionably offensive but Rubio obviously predisposed.

The Solicitor General once again cites *United States v. Thoma, supra*, which has now appeared in every Government brief since Jacobson's trial. Thoma had a prior conviction for distributing pornography. Postal Inspector John Ruberti sent Thoma a free membership in "Crusaders for Sexual Freedom." Thoma then placed an ad in "Crusaders" newsletter seeking a photo session with "young preteen and teenage boys and girls." Ultimately, Thoma answered twenty eight ads and wrote Ruberti, posing as the secretary of "Crusaders" asking if an answer to an ad placed by the police would constitute entrapment. Thoma also sold, and mailed Ruberti five hundred sexually explicit photos of teens and preteens. When Thoma was arrested, he confessed that he had only gotten back into the pornography business because money was tight.

It is hard to see the parallel between these defendants and Jacobson. Stuart Patten said the purpose of the Hedonist Society was to get people to trade (child pornography) through it. (TR166:15-16). Jacobson never traded through the Hedonist Society. Jacobson had no record of criminal activity and it was not the commission of a crime which brought him to the postal authorities' attention. These other defendants had engaged in prior criminal conduct clearly knowing that was what they were doing.

IV. REQUIRING THE GOVERNMENT TO HAVE A REASONABLE INDICATION THAT A TARGET IS ENGAGING, HAS ENGAGED OR IS LIKELY TO ENGAGE IN CRIMINAL ACTIVITY DOES NOT UNDULY BURDEN UNDERCOVER OPERATIONS.

At page 41 of the Government's brief, the Solicitor argues that a reasonable suspicion requirement "would severely hinder . . . commonly used undercover investigations premised on random contact with the general public."

Any rules fashioned from statutory construction, Congressional enactment or constitutional interpretation to protect the citizen from Government overreaching hinders law enforcement. Nevertheless, rules there are, because rules are needed. The Ninth Circuit has even pleaded for guidance in this area. In *United States v. Mitchell*, *supra*, a "Love Land" sting, footnote 8, 915 F.2d 521 states:

> The investigation in the case at bar illustrates why there is a need for some due process [7] limits on undercover operations. Thousands of persons answered the Love Land questionnaire yet only 1400 gave answers that triggered further solicitation. The thousands who did not give such answers nonetheless unknowingly disclosed their sexual attitudes and proclivities to the Government and were deceptively led to tell the government such intensely private information as the age when they had their first sexual experience. That the government, in persuading persons to answer the questionnaire, cynically invoked the rhetoric of the First Amendment is particularly offensive.

However, another good answer to the Solicitor's argument is that each of the undercover operations described in his brief is a subparagraph (b) sting:

> (b) the opportunity for illegal activity has been structured so that there is reason for believing that

[7] "Limits" is the operative word. Petitioner should not be understood to argue that the Fifth Amendment is the only source available.

> persons drawn to the opportunity or brought to it, are predisposed to engage in the contemplated illegal activity (Petitioner's brief, p.20; Senate Report No. 97-682).

This paragraph of the Senate Select Committee final report also distinguishes the Abscam cases mentioned by the Solicitor. The Government Amscam informant, testified in one of those cases, *United States v. Kelly*, 707 F.2d 1460, 1462 (D.C. Cir., 1983):

> We had a big honeypot and all the flies came to the honey.

In contrast to Jacobson, who was bombarded for at least 28 months with sexual surveys, newsletters, correspondence from fictitious friends and First Amendment rhetoric, the Abscam defendants caught themselves by dipping their fingers into the "honeypot."

Requiring the Government to have a reasonable indication that a subject is engaging, has engaged or is likely to engage in illegal conduct before Government agents begin a campaign of inducement to criminal behavior is no more than restating Mr. Justice Roberts "reasonable cause to believe" phrase from *Sorrells*. 77 L.Ed. 426. If this is so burdensome, it is a wonder that the Attorney General adopted it in the first place.

V. WHEN THE GOVERNMENT CREATES A MARKET FOR ILLEGAL ARTICLES BY EXPLOITING THE VULNERABILITY OF OTHERWISE INNOCENT CITIZENS, THE GOVERNMENT HAS COMMITTED ENTRAPMENT AS A MATTER OF LAW.

Reading the Circuit Court opinions cited by the Solicitor General "suggests a certain semantic disarray." *United States v. Evans*, 924 F.2d 714, 717 (C.A.7, 1991).

The opinions of the Supreme Court, however, are in order. While Judge Fagg's en banc opinion in this case comingles Government undercover operations with Fifth Amendment Due Process principles, *Sorrells v. United*

States, supra, says entrapment is not a constitutional defense, but exists because it was not the intention of Congress "in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them." 77 L.Ed.2d at 420.

While the Circuit Courts struggle to comprehend "inducement" and even claim the "consideration of inducement as a separate issue serves no useful purpose and we believe it to be a mistake. . ." *Kadis v. United States*, 373 F.2d 370, 373 (C.A. 1, 1967), Sorrells speaks plainly of an "alleged offense which is the product of the creative activity of (Government) officials," 77 L.Ed. 422, approves the language of Judge Sanborn in *Butts v. United States*, 273 F.38, 18 A.L.R. 143 (C.A.8, 1921) criticizing Government officials who "inspired, incited, persuaded and lured," and condemns official conduct:

> . . . when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

While the Eighth Circuit's majority concludes that this is not a case "in which the Government was an manufacturer rather than a detector of crime," 916 F.2d 467, 470, *Sherman v. United States, supra*, warns against "tempting innocent persons into violations," 2 L.Ed.2d 851; urges that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," 2 L.Ed.2d 851; and reprehends "play(ing) on the weakness of an innocent party and beguiling him into committing crimes which he otherwise would not have attempted." 2 L.Ed.2d 858.

The Government's argument in *Sherman* was identical to the Solicitor's principal contention in this case, Sherman's "ready complaisance." 2 L.Ed.2d 852. But Sherman, like Jacobson submitted only after repeated solicitation, and made more narcotics sales than the one for which he was prosecuted, just as Jacobson made one other purchase besides the one for which he is prosecuted. The Court said in *Sherman* that such sales "were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement". (2 L.Ed.2d 852).

Three times since *Sherman* the Supreme Court has had the opportunity to re-examine *Sorrells* and *Sherman* but each time left them undisturbed. In *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 98 S.Ct. 1637 (1973), the court said, "we are content to leave the matter where it was left in *Sherman*. . ." 36 L.Ed.2d 375. In *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the court briefly reviewed *Sorrells, Sherman* and *Russell* and concluded:

> If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce it commission' . . . *Sorrells, supra*, at 442, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249, the defendant is protected by the defense of entrapment. 48 L.Ed.2d 119.

In *Mathews v. United States*, 485 U.S. 58, 99 L.Ed.2d 54, 108 S.Ct. 883 (1988) the Court again adhered to the view that the defense of entrapment has two related elements, inducement and "a lack of predisposition on the part of the defendant to engage in the criminal conduct." The Court repeated that predisposition:

> focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. 99 L.Ed.2d 61.

Thus, the Court has consistently adhered to the proposition that there is a distinction between being predisposed and merely vulnerable.

Sherman was a recovering drug addict. He was vulnerable but when approached by Kalchinian he was resisting his demons. He had done nothing wrong.

Jacobson is a stronger case than Sherman because Jacobson had no criminal history when approached by Patten while Sherman had two prior convictions, a nine year old sales conviction and a five year old possession conviction. Jacobson had received two nudist magazines in the mail which the Government concedes was not a crime. He had no pedophilic collection in his posesssion when his home was searched. Sherman, on the other hand, was a known drug addict with a previous history of unlawful activity undertaken to gratify his addiction.

Jacobson is a war veteran living a small rural community. He produced evidence of good citizenship, regular, responsible employment and an excellent reputation. He is strikingly similar in many respects to C.V. Sorrells except Jacobson was solicited by mail instead of face to face.

Both Sherman and Sorrells were arrested for acts which both knew were crimes when committed. That factor does not appear in this case. The jury did not determine that Jacobson knowingly ordered sexually explicit photos of minors knowing that it was a crime to do so. Jacobson denied he knew it was a crime.

Lonely old men who may harbor "'private fantasies" are not within the statute's (18 N.S.C. 2252(a)) ambit. *United States v. Wiegand*, 812 F.2d 1239, 1245 (C.A.9, 1987). Although the Government has a duty to protect children by suppressing the market for child pornography, the Government cannot first create the market by tempting the innocent, but vulnerable and then justify prosecution by claiming it is merely suppressing the market.

Keith Jacobson should have been left alone.

CONCLUSION

This case should be reversed and remanded with directions to dismiss.

Respectfully submitted,

GEORGE H. MOYER, JR.
MOYER, MOYER, EGLEY,
FULLNER & WARNEMUNDE
114 West Third Street
P.O. Box C
Madison, NE 68748
(402) 454-3321
Counsel for Petitioner